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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIOT A. SANTANA, JR.,

Defendant and Appellant.

B226585

(Los Angeles County
Super. Ct. No. TA111192)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ronald V. Skyers, Judge. Reversed and remanded.

Margaret E. Dunk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Elliot A. Santana, Jr., appeals from the judgment entered after a jury convicted him of assault on a peace officer with force likely to produce great bodily injury. We reject his contention that the trial court erred by denying his pretrial motion to dismiss an allegation that he committed his crime for the benefit of a street gang. However, because Santana never waived his constitutional, trial-related rights before admitting that certain prior conviction allegations were true, we reverse as to those and remand for a new trial on the allegations. We also conclude that the trial court erred by refusing to disclose certain information from the personnel file of the arresting officer, conditionally reverse the judgment, and remand for a hearing where the trial court will determine whether its error was prejudicial.

FACTS AND PROCEDURAL HISTORY

Elliot Santana, Jr., was arrested on the night of March 5, 2010, after he was spotted throwing a bottle at Los Angeles Police Officer Gerardo Perez, who was one of many officers attempting to control a rowdy crowd of partygoers in the streets around the Nickerson Gardens housing project.

Several officers had just subdued a man named Robins, who they thought was carrying a gun. When the crowd became hostile and aggressive in response to this, other officers, including Perez, formed a skirmish line to protect the officers who were arresting Robins. Perez saw Santana throw a bottle in his direction, and the bottle landed two feet from Perez. Santana ran off, but Perez and other officers were able to stop him.

Santana was charged with three counts: (1) assaulting a peace officer with a deadly weapon (Pen. Code, § 245, subd. (c)); (2) assaulting a peace officer with force likely to produce great bodily injury (Pen. Code, § 245, subd (c)); and (3) interfering with an executive officer (Pen. Code, § 69).¹ The information alleged that each crime was committed for the benefit of a street gang. (§ 186.22, subd. (b).) The information also alleged that Santana had two prior convictions that qualified as strikes under the

¹ All further undesignated section references are to the Penal Code.

Three Strikes law, and that one of those convictions also qualified for the sentence enhancements provided by sections 667, subdivision (a)(1) and 667.5, subdivision (b).

Santana brought a pre-trial motion to dismiss the street gang allegation (§ 995), contending that the evidence from the preliminary hearing was insufficient to warrant such an allegation. The trial court denied that motion.

Santana contended that someone else threw the bottle at Perez, and that Perez was lying when he named Santana as his attacker. Based on that allegation, he brought a *Pitchess*² motion to discover whether complaints about falsification of evidence and police reports or other types of misconduct had been made against Perez. The trial court granted that motion as to false police reports. After conducting an in camera review of Perez's personnel file, the court concluded that there were no documents responsive to the discovery request.

The jury convicted Santana of count 2, assault on a peace officer with force likely to produce great bodily injury. He was acquitted of the other two counts, and the jury found that the street gang allegation was not true. After Santana admitted his prior convictions, the trial court granted Santana's motion to dismiss both Three Strikes allegations. He was given a combined 10-year sentence, including five years for the section 667, subdivision (a) and one year for the section 667.5, subdivision (b) enhancements.

Santana contends that the trial court erred by denying his motion to dismiss the street gang allegation. He also contends that his admission of the prior convictions was defective because he was never advised of or waived any of his constitutional trial-related rights when doing so. He contends that the trial court's order granting his *Pitchess* discovery motion was improperly limited to complaints of filing false police reports. Finally, even if we conclude the scope of the trial court's *Pitchess* order was proper, he asks that we conduct our own in camera review of the record and determine whether it in fact contained discoverable information.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

DISCUSSION

1. *There Was Sufficient Evidence to Support the Street Gang Allegation*

Santana was charged with a street gang allegation: that his crime was “at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) He contends the trial court erred by denying his section 995 motion to dismiss that allegation because there was insufficient evidence from the preliminary hearing to support a finding that there was probable cause to believe he had violated section 186.22.

Probable cause means facts that would lead a reasonable person to believe and conscientiously entertain a strong suspicion of the defendant’s guilt. (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 739.) An information will not be set aside if there is some rational ground for assuming the possibility that an offense has been committed by the defendant. (*D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861, 880.) The sufficiency of the evidence to sustain guilt or innocence is not at issue. (*Swanson-Birabent*, at p. 740.) We apply the substantial evidence test when reviewing the magistrate’s ruling at the preliminary hearing, and draw all legitimate inferences in favor of the information. (*Ibid.*)

Evidence to support the gang allegation came primarily from Los Angeles police officer Tyson Hamaoka, who testified at the preliminary hearing as a gang expert.

Hamaoka testified that the site of the disturbance at Nickerson Gardens was in the territory of the Bounty Hunter Bloods gang. Robins, the man whose arrest touched off the incident, was a member of that gang, as was Santana. Officer Perez testified that a majority of the crowd was wearing the colors red or black, and Santana was wearing a red hoodie and red and black shoes. According to Hamaoka, red is the color of the Bounty Hunter Bloods.

Hamaoka believed that Santana's conduct was committed in association with and for the benefit of that gang. He based his opinion on the following: Santana was at a gang party with other people wearing the gang colors, which made them either members or associates of the Bounty Hunter Bloods; Santana was part of the crowd encroaching on the police scrimmage line; while the crowd had been shouting, Santana escalated matters by throwing a bottle at Perez; not only was Santana associating with other gang members when he did so, he also benefitted his own reputation by showing he was willing to run the risk of substantial jail time, thereby showing that he is "down" for his hood and his gang.

Santana contends this testimony was insufficient to show that he either acted in association with or at the direction of gang members, or that he had the specific intent to assist, promote, or further criminal conduct by gang members. He points to the following to support his contention that the gang allegation should have been dismissed: no gang signs were shown and no gang slogans were shouted; Santana was 15 to 20 yards from the crowd encroaching on the scrimmage line; the incident took place after Robins had been subdued; Hamaoka testified that Santana benefitted his own reputation, and did not say that his actions benefitted the gang's reputation; just because other gang members might have been around does not mean Santana acted in association with any of them; and there was no evidence Santana had the specific intent to promote, further, or assist criminal conduct by fellow gang members because he was the only one to throw a bottle and there was no evidence of other crimes being committed by gang members.

We believe Santana has failed to consider the apparent crime being committed in connection with the mob that was advancing on the police. According to Perez, it was a "415 crowd" that was large, loud, and not complying with orders to disperse and leave the area. By 415, we assume Perez was referring to section 415, which makes it a crime to maliciously and willfully disturb someone by loud or unreasonable noise (subd. (2)), or to use offensive words in a public place that are inherently likely to provoke an immediate violent reaction (subd. (3)). The conduct Perez described could have just as easily violated section 69 (interfering with executive officer), section 406 (riot), section

407 (unlawful assembly), or section 409 (failing to disperse after warning). (See *People v. Patino* (1979) 95 Cal.App.3d 11, 22-26 [evidence that defendant was part of group advancing on arresting officers that was yelling, screaming, and throwing bottles was sufficient for probable cause finding on charge of violating section 69].)

When Santana threw his bottle at Perez, it was this criminal conduct he was assisting. Given the relatively low threshold required to support a probable cause finding, we conclude there was sufficient evidence that there were other gang members in the unlawful crowd, and that Santana was associating with them when he threw the bottle. We also conclude that Hamaoka's expert opinion that Santana acted with the intent to assist them was sufficient to support the street gang allegation. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [commission of a crime in concert with known gang members is substantial evidence to support inference that defendant acted with specific intent to promote, further, or assist gang members in commission of a crime].)³

2. *Santana Was Not Advised Of His Rights Before He Waived Trial on the Prior Conviction Allegations*

Before accepting a criminal defendant's admission of a prior conviction, the trial court must advise the defendant and obtain waivers of three rights: (1) the right to a trial to determine the fact of the prior conviction; (2) the right to remain silent; and (3) the right to confront and examine adverse witnesses. (*People v. Mosby* (2004) 33 Cal.4th 353, 356 (*Mosby*).) Santana contends this did not occur when he admitted his prior convictions. We agree.

³ Even if the court erroneously denied the section 995 motion, because defendant raised the point on appeal rather than by writ of prohibition under section 999a, he must show prejudice. (4 Witkin, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 239, p. 449.) Here, the jury found the gang allegations not true. Under these circumstances, no reasonable jury would have convicted defendant of felony assault on a police officer based on its antipathy toward gangs when it had found that defendant did not act in furtherance of a gang.

Right after the jury verdict was announced, the trial court asked defense counsel if Santana wanted to “waive the jury for [the prior conviction allegations].” After a brief, unreported conversation between defense counsel and Santana, the lawyer said, “He’s willing to admit the priors and waive jury.” After the jury was discharged, the court asked the prosecutor to take Santana’s plea on the prior convictions. After having Santana confirm his name and date of birth, the prosecutor read out loud the case numbers and conviction dates of two robbery convictions alleged for purposes of the Three Strikes law, and asked Santana whether he admitted that he suffered those convictions. Santana said he did. The prosecutor then asked Santana whether he would admit one of those two convictions for purposes of the section 667, subdivision (a)(1) allegation, and Santana said he did. The court then asked, “Did we do anything with [section] 667.5 [subdivision (b)]?” The prosecutor replied that “he just admitted that.” Based on Santana’s admissions, the court found the prior conviction allegations to be true.

Although Santana was never advised of, nor waived, the three rights mentioned above, respondent relies on *Mosby*, *supra*, 33 Cal.4th at pages 364-366 to contend that proper advisements and waivers can be gleaned from all the circumstances, including: the trial court asked defense counsel if Santana was willing to “waive the jury,” and, after a brief discussion with Santana, the lawyer said Santana would admit the priors and waive the jury; this occurred right after Santana had just concluded a trial during which he exercised his right to remain silent and his lawyer confronted and examined witnesses; and Santana’s motion to dismiss the two Three Strikes allegations mentioned that he had admitted the prior convictions.

In *Mosby*, right after the jury reached a verdict, the defendant was advised that he had a right to a jury trial on the prior conviction. He waived that right and admitted the truth of the allegation. In holding that the totality of the circumstances indicated a voluntary and intelligent waiver of all three rights, the *Mosby* court considered several factors. First, the defendant had just finished a trial where his co-defendant testified but he did not, indicating that the defendant understood he had the right to remain silent at

trial, thereby forcing the prosecution to prove he committed the charged offense. Second, his lawyer examined witnesses, indicating the defendant would have understood his right to confrontation. Finally, the court considered the defendant's prior experience with the criminal justice system as evidence of a repeat offender's knowledge and sophistication regarding his legal rights, noting that his prior conviction came after a guilty plea where he must have been advised of the same three rights. (*Mosby, supra*, 33 Cal.4th at pp. 364-365.)

We conclude the facts here are sufficiently different from those in *Mosby* that we cannot say with any assurance that Santana truly knew of and voluntarily waived his rights to trial, to remain silent, and to confront witnesses. Unlike *Mosby*, the trial court did not expressly advise Santana of his right to trial. Instead, it asked if he wanted to waive the jury. No co-defendant was involved, and therefore even though Santana did not testify, it is not as clear as in *Mosby* that he would infer the existence of his right to silence. Although Santana had two prior convictions, there was nothing to indicate they were the product of guilty pleas where he would have necessarily been advised of the same three rights. Finally, although the prosecutor said Santana had admitted his prior conviction for purposes of the section 667.5, subdivision (b) enhancement, no admission of that allegation was in fact taken.

The remedy for this error is reversal as to the prior conviction enhancements and remand for a new trial on that issue only. (*People v. Moore* (1992) 8 Cal.App.4th 411, 422.)⁴

⁴ Santana also contends, and respondent concedes, that the trial court erred by using the same prior conviction to support both the section 667, subdivision (a) and section 667.5, subdivision (b) enhancements. Because we remand for a new trial on the validity of those prior convictions, we leave it to the trial court to decide which, if any, enhancements to apply.

3. *Remand For a Hearing on the Prejudice From Denial of Pitchess Discovery Is Required*

Pursuant to Evidence Code section 1043 and 1045, Santana sought, and the trial court granted, in camera discovery of complaints or other material in Officer Perez's personnel records that were relevant to Santana's claim that someone else threw the bottle and that Perez was lying when he said Santana attacked him. At the hearing where the trial court granted that motion, it described the scope of its ruling in two ways: First, as to "false police reporting," and second, as to "falsity." After conducting an in camera review of the contents of Perez's file, the trial court found no relevant documents and therefore provided no information to Santana.

Santana contends the trial court erred by limiting the scope of discovery to false police reports. Respondent does not dispute that such a limitation would be too narrow, but contends that the trial court's broader description of falsity in general shows that the trial court's discovery order was sufficiently broad. In short, respondent effectively concedes that items pertaining to work-related falsehoods by Perez would be discoverable.

We need not resolve this dispute, however, because Santana has asked in the alternative that we conduct our own in camera review of the record from the trial court's *Pitchess* hearing and decide for ourselves whether the trial court abused its discretion by determining that nothing in Perez's file was discoverable. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) Respondent does not object to that procedure.

The sealed transcript of the trial court's *Pitchess* review shows that the custodian of records produced records related to the only four complaints ever made against Perez. The nature of those complaints was described for the record, and the court found each was not relevant. We conclude the trial court erred as to one complaint, which involved

an alleged threat by Perez to plant a gun. Such misconduct, if true, was certainly akin to Santana's assertion that Perez lied when he identified Santana as the bottle-thrower.⁵

The remedy for the trial court's failure to disclose information relevant to Santana's *Pitchess* motion is to conditionally reverse the judgment and remand for a hearing where the trial court must determine whether a different outcome was reasonably probable had the material been disclosed before trial. (*People v. Gaines* (2009) 46 Cal.4th 172, 182-183.) Should the trial court determine that no prejudice occurred from its earlier failure to disclose the information, then the judgment of conviction and sentence will be reinstated, subject to the results of any new trial on the prior conviction allegations. Should the trial court determine that Santana was prejudiced by the failure to disclose, then the trial court shall order a new trial. (*Id.* at p. 183.)

DISPOSITION

The judgment is conditionally reversed as to the conviction on the felony assault on a police officer count, pending the outcome of a trial court hearing to determine whether its failure to disclose the one relevant incident in Perez's personnel file was prejudicial. If it was prejudicial, then a new trial shall be ordered. If the trial court determines that it was not prejudicial, then the judgment of conviction shall be reinstated. The judgment is also reversed as to the prior conviction allegations and is remanded for a new trial and re-sentencing as to those allegations.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

⁵ No other complaints bore on the issue of whether Perez had ever before made, or threatened to make, false statements in order to implicate someone in a crime. In fact, none of the other complaints related to any of the categories sought by Santana's *Pitchess* motion.